To: Judge John Dailey, chair of the Colorado Criminal Rules Committee.

From: Kevin McGreevy

Date: October 9, 2020

RE: Crim. P. 24(d), Use of Peremptory Challenges, Challenging Race as a Factor in Exclusions

I am asking the Committee on Criminal Rules in Colorado to consider whether an amendment to Crim. P. 24 is appropriate to establish a framework and standards on allegations of racially motivated exercise of peremptory challenges during jury selection.

On June 11, 2020, the Justices of the Colorado Supreme Court posted an open letter to the judicial branch employees on its website. That letter expressed an invitation to engage in the difficult work to address areas of racial injustice within the branch. The Justices wrote, "We urge all members of the branch to engage respectfully and productively in the difficult dialogue that we must have to address the issues confronting our Black community and thus our community as a whole. It is only through this kind of open discussion and fellowship that we can truly make progress toward the ideals of liberty and justice for all."

One way to accept the Justices' invitation is to consider amending Crim. P. 24(d) to address the explicit and implicit bias in the use of peremptory challenges. We would not be paving new ground. The Washington Supreme Court adopted General Rule 37 in April of 2018 to address this issue. That Rule states:

Rule 37. JURY SELECTION

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of Questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of Questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more Questions or different Questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge;

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;
(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

I have some reasons to believe the Justices may be interested in having our Committee address this topic. First, and foremost, the June 11, 2020 letter from the Justices is a genuine invitation to do so. Historically our Committee has been reactive to changes in case law or the legislature, recently our Committee proposed a new standard and framework for concerning public access to records, primarily in response to a memo from Chief Justice Coats. That suggests to me a willingness of the Court to consider rule amendments that are not so narrowly reactive to the traditional influences on changes to the rules. Finally, change in the peremptory challenge process of this scope is unlikely to be handed down through review of any case by the Supreme Court, as there would not be an established record in the trial court to review.

Indeed, one of the benefits of the Washington State GR37 is the establishment of a record at trial concerning demeanor excuses to justify an alleged improper use of a peremptory challenge. In 2017, the Colorado Supreme Court readdressed *Batson v. Kentucky*, 476 U.S. 79 (1989). In *People v. Beauvais*, 393 P.3d 509 (2017), the Court reversed the Court of Appeals that had reviewed the case with a critical eye on a party's demeanor-based reasons for using peremptory challenges, and for conducting a comparative juror analysis. In dissent, Justice Marquez laments the lack of framework for a record on the use of peremptory challenges when she writes:

> How can a reviewing court meaningfully determine whether a trial court "weighed all of the pertinent circumstances" if the trial court need not make any findings at all? I fully respect the deference we must give to trial courts' assessments of credibility and demeanor, but where the trial court makes no findings regarding any of several proffered reasons for exercising a peremptory strike, there is nothing on the record to which a reviewing court can properly defer. To reflexively uphold a trial court's *Batson* ruling under such circumstances is not the kind of justifiable deference owed to a trial court's assessment of credibility or demeanor—rather, it becomes an abdication of our responsibility as appellate courts.

Currently, our Crim. P. 24(d) states:

> **(d) Peremptory Challenges.**
> (1) For purposes of Rule 24 a capital case is a case in which a class 1 felony is charged.
>
> (2) In capital cases the state and the defendant, when there is one defendant, shall each be entitled to ten peremptory challenges. In all other cases where there is one defendant and the punishment may be by imprisonment in a correctional facility,

the state and the defendant shall each be entitled to five peremptory challenges, and in all other cases, to three peremptory challenges. If there is more than one defendant, each side shall be entitled to an additional three peremptory challenges for every defendant after the first in capital cases, but not exceeding twenty peremptory challenges to each side; in all other cases, where the punishment may be by imprisonment in a correctional facility, to two additional peremptory challenges for every defendant after the first, not exceeding fifteen peremptory challenges to each side; and in all other cases to one additional peremptory challenge for every defendant after the first, not exceeding ten peremptory challenges to each side. In any case where there are multiple defendants, every peremptory challenge shall be made and considered as the joint peremptory challenge of all defendants. In case of the consolidation of any indictments, informations, complaints, or summons and complaints for trial, such consolidated cases shall be considered, for all purposes concerning peremptory challenges, as though the defendants had been joined in the same indictment, information, complaint, or summons and complaint. When trial is held on a plea of not guilty by reason of insanity, the number of peremptory challenges shall be the same as if trial were on the issue of substantive guilt.
(3) For good cause shown, the court at any time may add peremptory challenges to either or both sides.

(4) Peremptory challenges shall be exercised by counsel, alternately, the first challenge to be exercised by the prosecution. A prospective juror so challenged shall be excused, and another juror from the panel shall replace the juror excused. Counsel waiving the exercise of further peremptory challenges as to those jurors then in the jury box may thereafter exercise peremptory challenges only as to jurors subsequently called into the jury box without, however, reducing the total number of peremptory challenges available to either side.

Personally being devoid of original thought, I would propose our Committee consider whether or not the Court should adopt the framework in use by Washington State for two and a half years by adding the following to Rule 24(d):

(5) **Improper Bias**: the unfair exclusion of potential jurors based on race or ethnicity is prohibited.

(A) **Objection**. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(B) **Response**. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

(C) **Determination**. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(D) **Circumstances considered**. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

> (i) the number and types of Questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of Questions asked about it;
> (ii) whether the party exercising the peremptory challenge asked significantly more Questions or different Questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
> (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
> (iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(E) **Reasons Presumptively Invalid**. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection, the following are presumptively invalid reasons for a peremptory challenge;

(i) having prior contact with law enforcement officers;
(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
(iv) living in a high-crime neighborhood;
(v) having a child outside of marriage;
(vi) receiving state benefits; and
(vii) not being a native English speaker.

(F) **Reliance on Conduct**. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

Justice Marquez concludes her dissent in *Beauvais* as follows:

"The need for public confidence in our judicial process and the integrity of the criminal justice system is essential for preserving community peace." People v.

> Cerrone, 854 P.2d 178, 196 (Colo. 1993) (Scott, J., dissenting). It is therefore "of paramount importance that the community believes we guarantee even-handed entry into our criminal justice system by way of the jury panel." Id. The result of today's decision, I fear, is that peremptory challenges will become "largely immune from constitutional scrutiny." Batson, 476 U.S. at 92–93, 106 S.Ct. 1712. I respectfully dissent."

Beauvais at 533.

Attached to this memorandum:
GR 37 Washington State
June 11, 2020 letter from the Justices of the Supreme Court

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Supreme Court of Colorado

2 East 14th Avenue
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June 11, 2020

To the Judicial Officers and Employees of the Judicial Branch:

We feel it is important to reach out to you in light of the wrenching events of the past two weeks. We have been starkly reminded that confidence in our system of justice is fragile and not universal—and cannot be taken for granted. In the face of this reminder, we must move forward together in service of our mutual commitment to justice—a commitment that is emblazoned on the cornice of the Ralph Carr Judicial Center, which proclaims "Liberty and Justice for All," and that is echoed on the entry wall of the building, which greets the public with Dr. Martin Luther King, Jr.'s admonition, "Injustice anywhere is a threat to justice everywhere."

Dr. King's words remind us of our mission as judicial branch employees to provide our community with a fair and impartial system of justice, and also of our need to hear the voices of those who feel that the ideals of equal justice have eluded them. We know the events that have unfolded across our nation in recent weeks have been painful to many. We've heard from our Black colleagues and coworkers that it's been especially difficult for them. By redoubling our efforts to ensure that our decisions are free of bias, we can help build a more universal faith in our courts and our system of justice. By continuing our work to diversify our bench, we can help to ensure that our courts reflect the communities we serve. And by collaborating with community organizations, we allow ourselves to see the world through the eyes of those who have felt ignored or marginalized. Collaboration, founded on a commitment to our common ideals and deep mutual respect, breeds hope.

Dr. King's famous line about injustice continued: "We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly." These words remind us that we share collective responsibility for securing liberty and justice for all. The rule of law on which our nation is founded is sustained only by society's collective belief in it and by our

collective responsibility as judges and members of the judicial branch to uphold it. Our judicial canons obligate all judicial officers to promote public confidence in our legal system. But it is only through our combined efforts that we can ensure this confidence moving forward.

These are painful times, but such times can bring us together and inspire us to reflect upon and address the significant issues with which our society is grappling—issues that we too often set aside for another day. Now more than ever, it is vital for us to be mindful of our unwavering commitment to equal justice under law.

We urge all members of the branch to engage respectfully and productively in the difficult dialogue that we must have to address the issues confronting our Black community and thus our community as a whole. It is only through this kind of open discussion and fellowship that we can truly make progress toward the ideals of liberty and justice for all. We thank you for the work that you do, and we encourage you to join us as we rededicate ourselves to our mission of providing fair and impartial justice to all.

With deep respect,

The Justices of the Colorado Supreme Court